

United States District Court Southern District of Texas

Case Number: 04-CV-4625

ATTACHMENT

Description:

☐ State Court Record ☐ State Court Record Continued

☐ Administrative Record

☐ Document continued - Part _____ of _____

☒ Exhibit to: 8
number(s) / letter(s) _____

Other: _____

**DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT
WITH RESPECT TO STRAUS' CLAIM THAT AN IMAGE OF ARNOLD PALMER
TAKEN BY A PHOTOGRAPHER NAMED MARC HAUSER, WITH CERTAIN
MODIFICATIONS MADE THERETO YEARS LATER BY GSK, IS A
DERIVATIVE WORK OF STRAUS' PHOTOGRAPH**

P

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT D. STRAUS, JR.,

Plaintiff

v.

DVC WORLDWIDE, INC. d/b/a DVC;
SMITHKLINE BEECHAM
CORPORATION d/b/a
GLAXOSMITHKLINE,

Defendants

§
§
§
§
§
§
§
§
§
§
§

Civil Action No. H-04-4625

Court Unit of Judge Rosenthal

DECLARATION OF JEFF SEDLIK

Pursuant to 28 U.S.C. § 1746, I, Jeff Sedlik, declare that the following statements are, on my personal knowledge, true and correct:

1. My name is Jeff Sedlik. I am over the age of eighteen, of sound mind, and am fully competent to make this Declaration. This Declaration is made for consideration by the Court in this lawsuit.

2. I have been retained as an expert for the Defendants DVC Worldwide, Inc. d/b/a DVC ("DVC") and Smithkline Beecham Corporation d/b/a Glaxosmithkline ("GSK") in this lawsuit to provide my opinions with respect to copyright issues, including licensing issues. My Curriculum Vitae is attached hereto as Exhibit 1.

3. I have examined the 1989 image of Arnold Palmer taken by Mr. Straus ("Straus") attached hereto as Exhibit 2, the 1995 image of Mr. Palmer taken by Marc Hauser ("Hauser") attached hereto as Exhibit 3, and the retouched form of the 1995 Hauser image that Mr. Straus claims is a derivative work, attached hereto as Exhibit 4. I have also examined the pleadings in this lawsuit, documents produced by the Plaintiff Straus, and documents produced by the Defendants DVC and GSK. I have examined numerous images of Mr. Palmer taken by other

photographers. I have reviewed the Declarations of Hauser, Valerie White and Steve Kapur that are being submitted to the Court in this case. Based on my years of expertise, I offer the following opinions for the Court's consideration.

4. Mr. Straus has acknowledged that the unretouched version of the portrait of Mr. Palmer in blue golf shirt as supplied by Arnold Palmer Enterprises is not a derivative of his photograph of Mr. Palmer. Mr. Straus alleges that the retouched version of that photograph, with a darkened version of the golf shirt, infringes on his photograph. I agree with Mr. Straus' opinion that the unretouched 1995 Hauser portrait supplied by Arnold Palmer Enterprises is not a derivative of Straus' portrait of Mr. Palmer, and that by extension, the use of that unretouched 1995 Hauser image received from Arnold Palmer Enterprises does not infringe on Straus' copyright.

5. Both the Arnold Palmer Enterprises image, which was shot by Hauser in 1995, and the Straus photograph, which was shot in 1989, are simple portraits of a man who has likely been photographed thousands of times during his career. Both the Hauser portrait and the Straus portrait feature Mr. Palmer in a comfortable seated pose, looking at the camera with a positive, confident attitude. As Mr. Straus has essentially admitted, this pose and attitude are not protected by the copyright law.

6. I personally interviewed Marc Hauser. Mr. Hauser informed me that, when walking through Mr. Palmer's home, he noticed natural light in a room that was conducive to a portrait. So, he asked Mr. Palmer to sit on his desk and look at the camera. Mr. Hauser informed me that he used "artificial" lighting from professional portable flash generators to supplement the natural light in the room, and used color gels over the lights to add a warmth to the portrait. This look, created by Mr. Hauser photographing Mr. Palmer indoors, is significantly different from the look of Mr. Straus' portrait, which was shot outdoors.

7. Mr. Hauser informed me that Mr. Palmer has two basic facial expressions that he uses in photo sessions. A smiling expression showing teeth, and a confident, positive look with the mouth closed. Straus' 1989 portrait features the former expression, while Hauser's 1995 portrait features the latter expression. This is another notable difference between the two photographs.

8. Both portraits feature Mr. Palmer facing camera with shoulders slightly hunched, which is a common pose, typical of photographs of Mr. Palmer (and of most other men who sit for portraits). Mr. Straus has admitted that Mr. Palmer's "hunch" is simply "the way he is."

9. No one photographer or copyright owner can rightfully claim a monopoly on portraiture featuring Arnold Palmer or any other person. Simple, straightforward portraits like the Straus image enjoy "thin" copyright protection. Straus is entitled to full remedies under copyright law in the event that copyright in his simple portrait is infringed by the creation of duplicate copies of his image, or the reproduction, distribution, display, transformation or performance of his image without his permission. However, if others create portraits of the same subject, Straus is not necessarily entitled to remedies – even if those portraits are similar or substantially similar to Straus' image. The standard for determining a derivative of a thin work is not substantial similarity, but is "supersubstantial similarity." Nimmer 13.03[A] 13-35.

10. Copyright law was not intended to be used as a barricade to stifle or prevent expression, whether commercial or otherwise. The mere creation of a simple, straightforward photograph of a person or object does not entitle the creator to prevent all photographers and others from creating similarly simple and straightforward photographs of the same people or objects. Nimmer 13.03 [B][2][b]. Such limitations would undermine the core purpose of copyright law. As such, I strongly agree with Mr. Straus' opinion that the 1995 Hauser image is not a derivative of Straus' 1989 photograph.

11. I strongly disagree with Mr. Straus' allegation that the retouched version of the 1995 Hauser photograph is a derivative of the Straus 1989 photograph. In my opinion, the retouched Hauser photograph is not a derivative of Straus' photograph. I have interviewed Mr. Kapur and reviewed Mr. Kapur's Declaration, and I understand that GSK made overall and localized color/contrast corrections for the purposes of reproduction, that is, GSK darkened the color of Mr. Palmer's golf shirt, lightened the color of his collar to provide separation between the dark shirt and Mr. Palmer's sun-tanned face, and retouched Mr. Palmer's skin for cosmetic reasons (to make Mr. Palmer look his best), and removed Mr. Palmer's insignia pin. In some uses, GSK flipped the image so that Mr. Palmer faces the product being advertised. In my opinion, these adjustments are typical retouching for portraits of senior men and consistent with customary advertising design practices, and do not result in a derivative.

12. Throughout his life and career, Mr. Palmer frequently has worn dark tops combined with lighter collars. This is one of Palmer's signature "looks" as made evident by various advertisements produced in this case in which Palmer has appeared throughout his career, wearing dark tops with light collars, attached hereto as Exhibit 5. The idea of a portrait subject in a dark shirt and white collar is not protected by copyright, because the shirt and collar are not protected expression. To establish infringement by similarity, the similarity between the two works must be similarity of protected expression. Straus has no claim over the color or appearance of the wardrobe in which Arnold Palmer appears in photographs. Nimmer 13.03[B][3] 13-69: Merger. Nimmer 13.03[B][4]: Scenes a Faire.

13. As the non-derivative unretouched 1995 Hauser image provided to DVC and GSK by Arnold Palmer Enterprises is identical to the retouched version in all respects other than the shirt color for color/contrast correction, the cosmetic retouching to the skin and hair, and the removal of the insignia pin, these changes are the primary factors in the determination as to

whether or not the retouched Hauser image is a derivative of Straus' work. All other factors, such as pose, the expression, the crop, and others are by Straus' own admission not derivative of his photograph.¹ Certainly, the removal of the insignia pin has no bearing on such a determination. As I've explained above, these adjustments are consistent with customary advertising design practices, typical retouching for portraits of senior men, and constitute unprotected ideas and scenes a faire. Such adjustments do not result in a derivative of Straus' photograph, and GSK's and DVC's use of the retouched image does not infringe on Straus' copyright.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on April 12, 2006.



Jeff Sedlik

¹

Straus has also admitted that all of the other photographs of Arnold Palmer used by GSK in its smoking-cessation program, independently created by other photographers, are not derivatives of his photograph.

PROFESSOR JEFF SEDLIK

940 East Second Street, Suite 8, Los Angeles, California 90012
p 213 626 3323 fx 213 626 8129

Curriculum Vitae

Professional photographer, educator, publisher, forensic analyst and consultant. Past National President of the Advertising Photographers of America (APA), the leading trade association in the commercial photography industry. Currently serves as President & CEO of the PLUS Coalition, the international photography industry standards body. Also serves as APA's Chief Advisor on Licensing and Copyright. 2005 Photography Industry Leadership Award, International Photography Council.

Advises clients on photographic business practices, copyright and contract issues, valuation of photography and photographs, right of publicity/privacy issues, photographic history, digital and traditional photographic techniques, and forensic photographic analysis. Provides expert witness and consulting services on these and other matters related to photography. Professor of Photography, accomplished and experienced educator, conducts advanced seminars and workshops for professionals, and teaches college-level courses at the Art Center College of Design.

Professional Experience

President & CEO, Sedlik Photography/Sedlik Productions, 1986 – Present

Current President & CEO of leading commercial photography and film production company. Producer, Director, Photographer, and Director of Photography, creating photography, film and video productions for advertising agencies, graphic design studios, the entertainment industry, and other clients. Operates SedlikStock, a subsidiary dedicated to licensing existing Sedlik images for advertising, editorial and merchandizing usage via affiliates including stock photography agencies and publishers. Maintains relationships with major photography industry manufacturers, testing and demonstrating analog and digital equipment and software.

Partial Client List

Clients: 3m, 20th Century Fox, A&E Television Network, ABR Information Services, Alpo, AmSouth Bank, Andazia, Inc, Arista Records, Association of Tennis Professionals, AT&T, Avery Dennison, Bank of America, Barrington Music Products, BBC, Blue Cross, BMG/RCA Records, Bristol Myers Squibb, Buena Vista Pictures, Bureau of Census, CareAmerica, Chesebrough-Ponds, CBS/Sony Music, Cedars Sinai, Century 21, Cherokee, Columbia Pictures, Computer Associates, Concord Records, Conroy's Florist, Direct TV, Disney, Doubleday, Dreyfus, Epson, Essilor, Farmer's Insurance, Federal Express, Fitzgerald-Hartley Co., Ford, Gannon/Hartley, Geffen Records, Georgia Pacific, Great Performances, Great Western Bank, GRP Records, GTE, Guinness Museum, Hanna-Barbera, Harcourt Publishers, Hopper Papers, Ikea, Infiniti Automobiles, Island Records, Janssen Pharmaceuticals, JVC Musical Industries, Kraft Food Products, Korg, Inc., LaFace Records,

Laura Ashley, Levi Strauss, Mark Taper Forum, Missouri Historical Society, MCA Records, MCA International, Metro Goldwyn Mayer, Microsoft, Motion Picture & TV Fund, Movieland, MSN, MTM Entertainment, MTV Networks, Navisite, NBC Television, Neenah Paper, Nestle', New World Pictures, Nike, Pacific Bell, Palm Press, Paramount Pictures, Phillip Morris, Polygram Records, Pomegranate Books, Potlatch, Prentice-Hall, San Diego Zoo, Schering Plough, SBC, Signature Eyewear, Smithsonian Institution, Sony Inc., Southern Natural Gas, Spanish Tourism Office, Sugar Hill Records, Taco Bell, Telarc International, Toyota, Turner Broadcasting, U. C. Press, United Airlines, United Way, Universal Studios, VH-1, Warner Brothers Records, Web TV, Windham Hill Records, Word Records, World Savings, Yamaha, Zellerbach, Ziff-Davis, Zildjian

Advertising Agencies & Design Firms: Alan Sekuler & Associates, Asher Gould, BBDO, Bozell, Brierley & Partners, Brooks-Gruman Advertising, Campbell, Mithun, Esty, Cline, Davis, & Mann, Cross & Associates Design, Dailey & Associates, Davis, Elen, Daymark, DDB Needham, Worldwide, Deutsch, Douglas Oliver Design, DVC Marketing, DZN, The Design Group, East/West Network, Fitzgerald & Associates, FKQ Advertising, FP Horak Advertising, Foote, Cone, & Belding, GBF Ayer, Goodby Silverstein, Grey Advertising, Hill & Knowlton, Huerta Design, Ikkanda Design, Interbrand, J. Walter Thompson, Kang & Lee, Kaufman/Stewart, Ketchum Advertising, Klemtner Advertising, Kovel Kresser, Kuester Group, Lehman Millet, Inc, Lintas Campbell Ewald, Mangos, Mediatrix, Melia Design Group, Ogilvy & Mather, OZ Advertising, Phillips Ramsey, Poppe-Tyson, Potter Katz & Partners, John Ryan Company, Saatchi & Saatchi, Seineger Advertising, Slaughter Hanson, SmithKlein Beecham, Strike Group, Team One Advertising, Team Creatif, Torre Lazur, Tracy-Locke, Tribe Design, Vrontikis Design, White Rhino Advertising, Young & Rubicam

Editorial: American Film, Arts & Entertainment, CD Review, Cosmopolitan, Details, Downbeat, Elle, Entertainment Weekly, Glamour, GuestInformant, Imperial Press, In Focus, Interiors & Sources, Jazziz, Jazz Times, Life, Los Angeles, Los Angeles Times Magazine, Mirabella, Music Connection, Newsweek, Photo District News, People, Premiere, Pulse, Q Magazine, Rolling Stone, Select, Spin, Time-Life

Other Professional Experience

President & CEO, Mason Editions, 1994-Present

Operates Mason Editions, a publishing company specializing in high quality lithographic reproductions of photographs.

Consultant and Expert Witness, 2000-Present

Provide consulting services, forensic analysis and expert testimony on legal, business and technical matters related to digital and traditional photography.

Adobe Photographer's Council, 2004-Present

Advises Adobe Systems on matters related to Adobe products and services, including digital photography, stock photography, and industry standards. Provides pre-release testing services to Adobe on the Adobe Photoshop, Bridge, Stock Photo, and Creative Suite products.

Advisory Board Member, WorkbookStock, 2000-Present

Serve on the advisory board of WorkbookStock, a leading stock photography agency. Consult on the development of a vendor contract, copyright registration procedures, and web interface.

Advisory Board Member, Exactly Vertical, 1998-2000

Served on the advisory board of Exactly Vertical, a company offering interactive business management solutions for photographers. Consulted on issues including web interface, software design, copyright registration, merchandizing, stock licensing, photographers' work flow, and branding.

Founder, Digital Technology Advisory Council, 2002

Founded an Advisory Council comprised of high level representatives from each of the leading photography industry manufacturers.

Awards & Recognition

Photography Industry Leadership Award, 2005

An award presented in May 2005 by the International Photography Council, a non-governmental organization of the United Nations.

Mamiya Award of Excellence in Photo Education, 1999

Recognized as a leading arts educator. Selected from all college-level photography instructors, nationwide.

Print's Regional Design Annual: Award of Excellence, 1999

Ozzie Awards: Silver Ozzie for Best Photography, 1999

Art Directors Club: Excellence in Photography, 1999

Art Directors Club: Excellence in Photography, 1999

The Clio Awards: Silver Clio, Director of Photography, Internet Rich Media Advertising, 1999

PDN/Nikon Award of Excellence in Self Promotion, 1998

Advertising Photographers of America: Best In Show, 1998

Communication Arts Award of Excellence in Editorial Photography, 1998

The One Show Award for Excellence in Advertising, 1997

Communication Arts Award of Excellence, Unpublished Work, 1997

Communication Arts Award of Excellence in Self Promotion, 1996

Communication Arts Award of Excellence in Advertising Photography, 1994

Communication Arts Award of Excellence, Book Series, 1993

Art Direction Magazine Creativity Award, 1992

Communication Arts Award of Excellence in Editorial Photography, 1992

Communication Arts Award of Excellence in Advertising Photography, 1991

Communication Arts Award of Excellence in Editorial Photography, 1990

Art Direction Magazine: Creativity Award, 1990

Articles Authored

Photo District News,

Contributor to Photo District News, the photography industry's primary trade publication. Authored the "Ask The Expert" column, writing on subjects of business management, licensing, copyright, and creativity.

In Focus

Contributor to In Focus Magazine, the magazine of the Advertising Photographers of America, writing on subjects including business management, industry trends, protecting the value of photography, licensing, copyright, creativity.

Wraparound

Regular Contributor to Wraparound Magazine, writing on legal and business topics.

APA/LA NewsMagazine

Contributor to the NewsMagazine published by the Advertising Photographers of America, Los Angeles Chapter.

Photo Media

"Get Down to Business" Fall, 2000

Articles on Jeff Sedlik, Sedlik Photography & Mason Editions

Jazziz Magazine

"The Jazz Image" January 1993

Jazziz Magazine

"Focus on Sedlik" January 1994

Photographic

"Jeff Sedlik" May 1995

Computing News

"Get Your Company on the Internet" June 26, 1998

Success

"The Jazz and Blues Masters" September 9, 1998

PC Computing

"Set Up Shop on the Internet in 60 Minutes or Less" September 1998

APA NewsMagazine

"Jeff Sedlik" December 1998, Volume 20, No. 4

Entrepreneur's Home Office

"Jeff Sedlik: Sharp Shooter" December 1998, Volume 1, No. 6

APA News In Focus

"An Interview with Photographer Jeff Sedlik" January 1999, Volume 8, No. 1

Studio Photography and Design

"Commercial Success: The Conceptual Photography of Jeff Sedlik" April 1999, Volume 2, Issue 4

PC World

"The Web and Your Business: Setting Up Shop Online" May 1999, Volume 7, No. 5

APA NewsMagazine

"The Life of a Shoot: From First Call to Final Billing" June 1999

APA NewsMagazine

"Studio Tour: Jeff Sedlik" September 1999

Photo District News

"Focus on Advertising: The Secret of Jeff Sedlik's Success" November 1999

ASMP/CT News

"Jeff Sedlik and the Ten Specific Steps Toward Making A Living Now and In the Future in Photography"
September 2002

Professional Societies

Picture Licensing Universal System (P.L.U.S.)

www.useplus.org

President and C.E.O.

Founded trade organization dedicated to the development and implementation of international licensing standards in the photography, illustration, publishing, advertising, and graphic design industries. Directed recruitment of trade organizations and other interested parties worldwide and supervised development and implementation of licensing standards. Ongoing.

Advertising Photographers of America / National

www.apanational.org

National President, 2000-2002

Chief Advisor on Licensing & Copyright, 2002- Present

Elected to top position in commercial photography by industry leaders nationwide in June, 2000. Directed and supervised all operations of the largest trade organization representing commercial photographers, leading more than seventy volunteer board members located in all areas of the country. Advised federal and state legislators, and Senior Officials at the Small Business Administration and US Copyright Office.

American Society of Media Photographers

www.asmp.org

Member

Advertising Photographers of America/Los Angeles Chapter

Board of Directors, APA/Los Angeles Chapter, 1998- 2002

Member, 1996 - Present

Served as Board Member directing non-profit trade association representing commercial photographers in Los Angeles. Served on legal/legislative committee and events committee.

Photography Instructors Education Association

Member

Teaching Experience

Art Center College of Design, Pasadena, California

Professor of Photography

Faculty Member, 1996 – Present

Developed and implemented classes in technique and business. Teach independent study courses and workshops. Mentor graduating students, advise on portfolio development and new business management. Active member of Intellectual Property Committee and Licensing Committee. Consulted with Business Curriculum Committee, reviewing and providing

feedback on school's new business curriculum. Named "Great Teacher" by photography students and presented with Great Teacher Award, 1996.

Other Teaching Experience: Workshops & Seminars

1977 – Present

Invited speaker/panelist at the industry's major trade shows, speaking on topics including copyright, licensing, self promotion, building an advertising photography business, stock photography and technical issues. Lectured on photography at LAUSD Community Adult School. Speak before groups of photographers and creatives nationwide. Wrote and produced the APA "Real World" seminar series on topics ranging from estimating, to licensing, to producing. Participated in the development of Digital Imaging For Photographers, a leading seminar series dedicated to cutting- edge digital techniques and equipment.

Foundation, Community Service and Charitable Work

President, Warren King Foundation, 2000 - 2002

Created foundation providing endowed photography scholarships to promising photography students. Produced a fundraising event attended by photographers, educators, government officials and media. Lobbied Los Angeles Unified School District to re-launch abandoned arts education programs in local schools. Arranged for a local arts teacher to receive a lifetime achievement award at the Kennedy Center.

Boy Scouts of America, 1972-1977

Eagle Scout

Other Community Service and Charitable Work

Conduct visiting lectures on the art and history of photography for elementary school students in the Los Angeles Unified and Pasadena Unified School Districts. Judge photography exhibitions at the high school, college, and amateur, and professional levels. Photograph pro-bono or reduced-fee public service campaigns for charitable organizations such as the LA Times "Reading by Nine" program, Jewish Family Services, Motion Picture and Television Fund, United Way, and others. Volunteered time to leadership in the Boy Scouts and public schools. Donated original photographic prints to each of the Focus On Aids annual fundraising auctions 1987-2003, Woodcraft Rangers, Pediatric Aids Foundation and other vital charitable organizations.

Education

Continuing Education

1986-Present

Attend workshops and seminars on business, legal and technical issues affecting photographers, with an emphasis on intellectual property, business management, stock photography, and digital technology courses. Consult with manufacturers and distributors in testing new equipment to stay abreast of the latest developments in digital imaging technologies.

Art Center College of Design, Pasadena, California, 1983-1986

BFA, Photography, with strong emphasis in Film,

University of California at Santa Barbara, 1980-1983

Liberal Studies major with emphasis in Art, Art History, Economics, Business Management.



Exhibit A to the Motion
Exhibit 2 to Valerie White's Declaration
Exhibit 1 to Steve Kapur's Declaration
Exhibit 2 to Jeff Sedlik's Declaration
Exhibit 2 to Jim Pickerell's Declaration

This is Robert Straus' 1989 image of Arnold Palmer



Exhibit B to the Motion
Exhibit 1 to Valerie White's Declaration
Exhibit 3 to Steve Kapur's Declaration
Exhibit 3 to Jeff Sedlik's Declaration
Exhibit 3 to Jim Pickerell's Declaration

This is Marc Hauser's 1995 image of Arnold Palmer



Exhibit D to the Motion
Exhibit 3 to Valerie White's Declaration
Exhibit 4 to Steve Kapur's Declaration
Exhibit 4 to Jeff Sedlik's Declaration
Exhibit 4 to Jim Pickerell's Declaration

This is the modified form of Marc Hauser's 1995 image of Arnold Palmer